

Department of Health and Human Services

**DEPARTMENTAL APPEALS BOARD**

Civil Remedies Division

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In the Case of:	)	
	)	
Eno Essien,	)	Date: December 18, 2007
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-07-699
	)	Decision No. CR1714
The Inspector General.	)	

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**DECISION**

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, Eno Essien, from participating in Medicare and other federally funded health care programs until Petitioner's certification as a nursing assistant is restored in the State of California.

**I. Background**

On July 31, 2007, the I.G. notified Petitioner, who had been working as a certified nursing assistant, that she was being excluded from participating in Medicare and other federally funded health care programs pursuant to section 1128(b)(4) of the Social Security Act (Act). Section 1128(b)(4) provides for the exclusion of any individual whose license to provide health care is revoked, suspended, or otherwise lost for reasons bearing on that individual's professional competence, professional performance, or financial integrity.

Petitioner requested a hearing and the case was assigned to me for a hearing. I held a pre-hearing conference at which I established a schedule for the parties to file written submissions including briefs and proposed exhibits. During the pre-hearing conference, I afforded each party the opportunity to request an in-person hearing conditioned on the party satisfying me that the party had relevant testimony that did not duplicate a document that is in evidence. October 12, 2007 Order and Schedule for Filing Briefs and Documentary Evidence (memorializing prehearing telephone conference). Neither party

requested that an in-person hearing be convened. The I.G. submitted a brief (I.G. Br.) and five exhibits (I.G. Ex. 1 – I.G. Ex. 5). Petitioner did not offer any exhibits, but she submitted a letter with testimony and, for that reason, I designate it as P. Ex. 1 and admit it along with the I.G.’s exhibits.

## **II. Issued, findings of fact and conclusions of law**

### **A. Issue**

The issue in this case is whether a basis exists for the I.G. to exclude Petitioner pursuant to the provisions of section 1128(b)(4) of the Act for a period that is coterminous with that of Petitioner’s loss of her certification as a nursing assistant in the State of California.

### **B. Findings of fact and conclusions of law**

I make findings of fact and conclusions of law (Findings) to support my decision in this case. I set forth each Finding below as a separate heading. I discuss each Finding in detail.

#### ***1. The I.G. is authorized to exclude Petitioner pursuant to section 1128(b)(4) of the Act.***

Section 1128(b)(4) of the Act states in relevant part that the Secretary of the United States Department of Health and Human Services (or his delegate, the I.G.) may exclude from participating in Medicare or a State health care program any individual:

whose license to provide health care has been revoked or suspended by any State licensing authority, or who otherwise lost such a license or the right to apply for or renew such a license, for reasons bearing on the individual’s . . . professional competence, professional performance, or financial integrity . . .

Act, § 1128(b)(4)(A).

The evidence offered by the I.G., which Petitioner did not rebut, establishes that on August 22, 2006, the California Department of Health Services revoked Petitioner’s nurse assistant certification. I.G. Ex. 4. In doing so the agency found that in the course of providing care to a nursing home resident Petitioner pulled the resident’s hair, slapped her face, and covered her mouth with her hand in order to hold the resident down. *Id.* at 1. The State licensing authority concluded that:

You subjected your resident to physical abuse; you did not treat her with respect and dignity when you physically abused her . . . .

*Id.*

This evidence proves that Petitioner's certification was revoked by a state agency based on findings that she abused a patient (a nursing home resident) in the course of performing her duties. That is a finding that relates to her professional competence and/or performance.

I have considered whether revocation of Petitioner's nurse assistant certification is a revocation of a license to provide health care within the meaning of section 1128(b)(4) and I find that it is. The Act does not define the term "license to provide health care." I conclude that the section is intended to apply to any circumstance in which State certification or approval is a prerequisite to being permitted to perform work in the health care field. A certification of professional competence and training is necessary to work as a nursing assistant in California. Cal. Health & Safety Code, § 1337.2(e) (2006). The certification operates as a license in that it serves to limit the class of individuals who are permitted to provide nursing assistant services to only those who meet the minimum competence and training standards established by law. Thus, Petitioner's certification was the equivalent of a "license" because it had the same legal function as a license to provide health care. *See Owen C. Gore*, DAB CR1070 (2003).

The evidence offered by the I.G. therefore meets all of the criteria for exclusion pursuant to section 1128(b)(4) of the Act. Petitioner's license (her nurse assistant certification) was revoked by a California State licensing authority for reasons bearing on her professional performance.

Petitioner argues that she did not abuse the resident whose care was the basis for the revocation of her certification. She argues, apparently, that if the resident was abused, the abuse was perpetrated by some other individual. She asserts affirmatively that the care she provided to the resident was non-abusive and consistent with her duties. I find this argument to be, essentially, irrelevant. The authority to exclude under section 1128(b)(4) derives from the *State's* determination and not from the underlying facts. I have no choice but to sustain the determination to exclude in a case such as this, where a State has made findings sustaining a license revocation relating to the excluded person's professional competence or performance.

Petitioner also asks that I restore her nurse assistant certification. P. Ex. 1. I have no authority to do so. The appropriate forum to challenge the basis for Petitioner's license revocation would be before the State agency that revoked her license in whatever appellate process that ensues from that.

***2. The I.G. is authorized to exclude Petitioner for a period that is coterminous with the revocation of her certification as a nursing assistant in California.***

The exclusion in this case is coterminous with Petitioner's certification revocation. In other words, she remains excluded at least until she regains her certification. That is consistent with the regulatory requirement that an exclusion under section 1128(b)(4) be at least coterminous with the loss of a license and, therefore, it is reasonable as a matter of law. Act, § 1128(c)(3)(E); 42 C.F.R. § 1001.501(b)(1).

### **III. Conclusion**

For the foregoing reasons, I sustain the I.G.'s determination to exclude Petitioner.

/s/

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Steven T. Kessel  
Administrative Law Judge